

**NetChoice** *Promoting Convenience, Choice, and Commerce on the Net*

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**NetChoice Public Comments to FTC on workshop on  
“Big Data: A Tool for Inclusion or Exclusion?” on September 14, 2014**

NetChoice respectfully submits the following comments regarding the Federal Trade Commission (“FTC” or “Commission”) workshop on “Big Data: A Tool for Inclusion or Exclusion?”

NetChoice is an association of leading e-commerce and online companies, plus thousands of small businesses that rely on e-commerce. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

Privacy-related laws that specify how data can be collected, used, and shared can create barriers to legitimate online commerce. NetChoice has a long history of breaking down regulatory barriers, beginning with helping travel agents, contact lens suppliers, and real estate brokers whose online innovations clashed with legacy regulations that protect traditional business models.

The analysis of large masses of disparate data (big data) creates the opportunity for immeasurable benefits to consumers. These benefits are as simple as identifying weather patterns, providing lower mortgage rates, fraud prevention, helping schools find underperforming students, and identifying growing viral outbreaks before they become epidemics. In addition, big data also has the ability to bring new competition to existing industries, allowing new entrants to quickly upend entrenched firms, drive down prices, and usher in cheaper prices and innovations.

However, we worry that the current obsession with hypothetical harms of this data will lead consumers to mistakenly fear its adoption and encourage unnecessary regulation – both of which will stymie the growth of these amazing tools.

The title and tone of the Commission and the staff’s remarks during the “Big Data: A Tool for Inclusion or Exclusion?” workshop was more about threats from big data than encouraging a focused discussion of the benefits, adequacy of existing laws, and how to educate consumers. Moreover, the Commission’s tone does not

***Since many conversations about big data involve theoretical misuses, the FTC should engage in a thorough study of actual harms and benefits of big data uses.***

match with the activities of consumers and city services,<sup>1</sup> the comments of some FTC commissioners,<sup>2</sup> and the White House's Big-data report.<sup>3</sup>

Rather than enabling the continued discussions about theoretical abuses of big data, the FTC is in the unique position to be an impartial fact finder. Moreover, the FTC employs a host of economists and analysts who focus on harm-benefit analysis, which were notably absent from the workshop. NetChoice suggests the FTC should once again devote serious resources to studying the real world impact of big data.

We recommend this analysis adopt the following 3-step approach based on the FTC's own unfairness doctrine:<sup>4</sup>

- 1. Search for actual harms: Look to see if consumer complaints point to real-world (not theoretical) harms which exist from the use and growth of big data. Such analysis should separate out actual harms from general privacy anxiety.**
- 2. Balance harms: If harms exist, they must be balanced against the actual benefits of big data (some of which are discussed within these comments). This balancing should include downstream impact of limitations on the use or collection of big data.**
- 3. Analyze existing laws. To avoid overly restrictive new laws, the FTC should research existing laws that mitigate identified harms not offset by benefits.**

## **1. Outline for an FTC Harms Study and A Critique of FTC Research So Far**

The FTC has yet to seriously identify real world harms of big data. Instead the FTC has focused on theoretical harms and anecdotes to drive the conversation. This does a disservice to the FTC and consumers. It calls into question the impartiality of the FTC and stymies consumer serving innovations.

### **OUTLINE FOR A STUDY OF ACTUAL HARMES**

*[T]he injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.*

-- FTC Policy Statement on Unfairness, Dec. 17, 1980<sup>5</sup>

The core of the FTC's power is its ability to bring an action under Section 5 of the FTC Act<sup>6</sup> for unfair trade practices. The unfairness arm requires a showing of harm – something the FTC has extensive history in identifying. In addition, this harm must not be substantial, not reasonably avoidable, and not outweighed by countervailing benefits.

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<sup>1</sup> E.g. The NY City Dept of Transportation iRideNYC, an app that shows residents the best modes of public transportation for their trips within the city by leveraging live data streams about each option: <http://www.iridenyc.com/>, see also Boston's use of Street Bump. Street Bump, available at <http://www.cityofboston.gov/DoIT/apps/streetbump.asp>

<sup>2</sup> See, e.g. the tone and impartial approach by Commissioner Ohlhausen stating, "Big data is a tool; like all tools it has strengths and weaknesses." Comments of Commissioner Maureen K. Ohlhausen, Federal Trade Commission, to NTIA on Big Data, *Consumer Privacy, and the Consumer Bill of Rights*, Aug. 5, 2014.

<sup>3</sup> See, e.g., President's Council of Advisors on Science and Technology, *Big Data And Privacy: A Technological Perspective*, May 5, 2014 (advocating a rationale identification and analysis of harms before engaging in legislative actions).

<sup>4</sup> FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

<sup>5</sup> *Id.*

<sup>6</sup> 15 USC § 41, *et al.*

### A. The FTC should identify real world harms identified by consumers

*In most cases a substantial injury involves monetary harm ... [and U]nwarranted health and safety risks may also support a finding of unfairness.*

-- FTC Policy Statement on Unfairness, Dec. 17, 1980<sup>7</sup>

To find actual harm to consumers, the FTC should analyze harms that consumers themselves identify. One possible starting point is the FTC's consumer complaint center. Last year the complaint center received more than 2 million complaints.<sup>8</sup> The FTC can analyze this data and see if any complaints are the result of big data. Moreover, the FTC can conduct surveys, conversations with consumers, analysis of complaint letters, and town hall discussions.

### B. Separate actual harms from general privacy anxiety

*"Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."*

-- FTC Policy Statement on Unfairness, Dec. 17, 1980<sup>9</sup>

To maintain credibility and provide a basis for new laws or regulations, this study should identify actual harms and not general privacy anxiety. These actual harms can include financial, employment, and physical harms. If these harms exist, the FTC can then begin its harms-benefits analysis.

### THE EXAMPLES PRESENTED IN SPEECHES ARE THEORETICAL OR ANECDOTAL – NOT BASED ON FACTS

To date, the FTC has focused on theoretical and anecdotal harms of big data or conflated big data with other issues. This undermines the reputation of the FTC as being impartial and skews the discussion of big data. Below are just a couple of examples of statements that we ask the FTC to adjust to allow for a more thoughtful discussion of big data.

#### Avoid uses of "Could," "May," and "Might"

Talking in hypotheticals often leads to a conversation of what may be and not what is so. This prevents a discourse of actual harms and instead leads to a "parade of horrors." In her speech to the US Chamber of Commerce, Commissioner Brill spoke mostly about potential harms of big data rather than actual harms or actual benefits. And the Commissioner used the words uses of "may", "might" and "could" over a dozen times<sup>10</sup> without identifying actual harms of big data alone.

#### Conflation of issues prevents conversations of real harms from big data

All too often the conversation of big data is conflated with discussions of internet of things, data brokers, and health data. Since the FTC has different workshops on each of the topics, it clearly sees a distinction between these issues.<sup>11</sup> Unfortunately, this delineation was missing from the Big Data Workshop.

For example, in her opening statement, Chairman Ramirez suggested that big data can lead to health harms and discussed data brokers.<sup>12</sup> Likewise, nearly half of Commissioner Brill's big data workshop

<sup>7</sup> FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

<sup>8</sup> "Between January and December 2013, the CSN received more than 2 million consumer complaints, which the FTC has sorted into 30 complaint categories." By organizing into categories the research is even more manageable. FTC Consumer Sentinel Network Data Book, Feb. 2014, p.2

<sup>9</sup> FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

<sup>10</sup> See FTC Commissioner Julie Brill, *The Trees and the Forest: Protecting Consumer Trust in the Big Data Era – Keynote Address at the U.S. Chamber of Commerce Foundation Conference on the Future of Data-Driven Innovation* (October 2014)

<sup>11</sup> See, e.g., "Internet of Things - Privacy and Security in a Connected World" Nov. 19, 2013, "Alternative Scoring Products" Mar. 19, 2014, and "Consumer Generated and Controlled Health Data" May 7, 2014.

<sup>12</sup> Transcript of FTC Workshop "Big Data: A Tool For Inclusion Or Exclusion," Sept. 14, 2014 reported by Jennifer Metcalf, p. 7

speech was about data brokers.<sup>13</sup> Finally, while presenting research on big data, the FTC Chief Technical Officer conflated the discussion with data from data brokers.<sup>14</sup> Data brokers do not necessarily depend on big data to compile many of their lists, and the FTC appears to be simply conflating data brokers and big data to justify regulating the latter.

Conflation of issues injects unnecessary rhetoric and frenzy into a general discussion and could be used to justify misdirected legislation. We ask the FTC avoid conflating these issues to maintain a focused discussion.

### *Exaggerating misuses of big data*

The FTC has a history of convening workshops designed for thoughtful discussion of issues. Unfortunately, at the Big Data Workshop, statements by the FTC created a discussion of speculative harms – combining them with charged words that inspire apprehension and opposition to the growth of big data.

Only a couple of minutes into the Big Data Workshop, Chairman Ramirez discussed hypothetical harms from big data. This description of possible harms included charged words like, “discrimination”, “unethical” and “illegal.”<sup>15</sup>

Of course, if any of the theoretical activities discussed are illegal, the FTC, Department of Justice, and other agencies can already take action. And if they are illegal, NetChoice supports law enforcement engagement.

However, talking in hypotheticals injects passion into what should otherwise be a calm rational discussion.

### **THE STUDY BY PROF. SWEENEY’S INTERNS WAS ANECDOTAL AND NOT ABOUT BIG DATA**

The FTC study by Prof. Latanya Sweeney’s interns had little to do with big data, and was, by the account of one FTC researcher, “anecdotal.”<sup>16</sup> Anecdotes could be useful to get a conversation started, but should not be the basis for sweeping regulatory or legislative changes. This study barely provided any meaningful analysis of the issues at hand aside from a couple out-of-context screenshots and a methodologically unsound review of credit card ads based on a non-transparent and fluid metric of online criticism.

Moreover, the presented study was not obviously about big data. The research conducted by Prof. Sweeney’s interns was presented as little more than visiting a webpage and looking at the contextual ads appearing.<sup>17</sup> It could be the case that those who conducted the study refreshed the webpage so many times that it randomly achieved the ads that concerned Prof. Sweeney. In addition, there are other factors driven by advertisers such as auction bids and placement targeting that were ignored.

One thing is certain – this anecdote does not indicate that any harms are being caused by big data. We ask the FTC should avoid suggesting this research is broader than its scope and avoid suggesting it is representative of most big data uses.

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<sup>13</sup> *Id.* at 146-149

<sup>14</sup> *Id.* at 152

<sup>15</sup> *Id.* at 5-7

<sup>16</sup> FTC Researcher Zang called the Omega Psi Phi example “the Omega Psi Phi anecdote.” Statement of FTC researcher Zang, *Id.* at 55.

<sup>17</sup> *Id.* at 154

## 2. Balancing Real World Harms

*The injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces.*

-- FTC Policy Statement on Unfairness, Dec. 17, 1980<sup>18</sup>

The FTC policy statement on unfairness sets out the guidelines for how this balancing of real world harms should occur:

Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects. The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.<sup>19</sup>

The FTC should balance actual harms, if any, against actual real world beneficial uses of big data.

### ACTUAL BENEFITS TO HEALTH SERVICES

With Ebola and the flu in the news, identifying epidemics is foremost on consumers' minds. Big data is helping identify an emerging problem before it becomes a full-blown epidemic.

Take for example, Google Flu Trends. This information helps direct care to places with the greatest need. In fact, one report found Google Flu Trends was able to predict regional outbreaks of flu up to 10 days before they were reported by the Centers for Disease Control and Prevention.<sup>20</sup>

Or consider how Boston Children's Hospital analyzed Wikipedia's traffic to help predict flu trends in the state up to 2 weeks earlier than the CDC.<sup>21</sup> In 2013 John Hopkins research report said that Google Flu Trend data "was the only source of external information to provide statistically significant forecast improvements over the base model." Moreover, when combined with CDC information the research becomes even more beneficial.<sup>22</sup>

### ONGOING GOVERNMENT USES OF BIG DATA

Governmental agencies are leveraging the benefits of big data.

The FDA used Kaiser Permanente's database of 1.4 million patients to show that the arthritis drug Vioxx increased the risk of heart attacks and strokes.<sup>23</sup> This saved lives and identified actual harms. Congress is considering a bill to allow collection of health data to better enable big data techniques to reveal the root causes, rates, and trend of sudden unexpected infant and child deaths.<sup>24</sup>

<sup>18</sup> FTC Policy Statement on Unfairness, Dec. 17, 1980, available at <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

<sup>19</sup> Transcript of FTC Workshop "Big Data: A Tool For Inclusion Or Exclusion," Sept. 14, 2014 reported by Jennifer Metcalf p. 155

<sup>20</sup> Google Flu Trends - <http://www.google.org/flutrends/about/how.html>

<sup>21</sup> Miguel Helft, *Google Uses Searches to Track Flu's Spread*, NY Times (Nov. 11, 2008)

<sup>22</sup> Ryan Parrish, *New model predicts flu trends using Internet traffic on Wikipedia articles*, VaccineNews (Apr. 23, 2014)

<sup>23</sup> Graham et al, *Risk of acute myocardial infarction and sudden cardiac death in patients treated with cyclo-oxygenase 2 selective and non-selective non-steroidal anti-inflammatory drugs: nested case-control study*, The Lancet, Vol. 365, No. 9458, 2005, pp. 475-481

<sup>24</sup> Sudden Unexpected Death Data Enhancement and Awareness Act, H.R. 669, 113th Cong. (2013)

Likewise the company Palantir develops algorithms that are be used to identify terrorist threats using communications and other data, and to detect fraudulent behavior in health care and financial services.

Finally, big data apps like street bump helped the city of Boston<sup>25</sup> to more efficiently identify and address street potholes.

### HELPING CONSUMERS SAVE MONEY

Big data helps consumers identify opportunities to save money.

For example, Farecast analyzes billions of flight-price records to predict the movement of airfares and saves purchasers an average of \$50 per ticket.<sup>26</sup> Decide.com uses big data to predict price movements for millions of products and saves consumers hundreds of dollars.<sup>27</sup>

There are hundreds of similar consumer-benefiting services. The FTC should identify them and balance all these benefits against any harms if found.

### 3. Research to Determine Whether Harms are Already Addressed by Existing Laws

*Before seeking new privacy legislation, it is important to identify a gap in statutory authority*

-- FTC Commissioner Maureen K. Ohlhausen, Oct. 16 2012<sup>28</sup>

As discussed above, the FTC already enjoys enforcement authority under Section 5 should it identify uses of big data that are unfair. And every state Attorneys General has the similar powers under little Section 5. Likewise, dozens of other federal laws can address the hypothetical harms cited during the workshop: Health Insurance Portability and Accountability Act (HIPAA),<sup>29</sup> Fair Credit Reporting Act (FCRA)<sup>30</sup>, and Equal Employment Act (EEA)<sup>31</sup>, just to name a few.

We ask the FTC, if it identifies actual harms not offset by actual benefits, to engage in a legislative analysis to identify if existing laws already address the harms. For example, if big data is used to harm employment, the FTC should research existing employment discrimination and protection laws and identify if gaps exist. The same is true for credit scores and racially based discrimination. If gaps are found, the FTC should look at different ways to fill the gaps though appropriate policy mechanisms, including self-regulatory and co-regulatory models.

Until this analysis occurs, the FTC should avoid calling for legislation – especially when actual harms have not yet been identified and balanced against actual benefits.

A concern raised at the Big Data Workshop was that big data could be used to mask historical discrimination. If big data is being used in this way, the FTC should look to see if existing racial discrimination laws already address even masked discrimination. If so, the FTC should identify the tools law enforcement needs to identify these unlawful practices.

Nonetheless, before creating new rules and regulations, we ask the FTC to follow the recommendation of Commissioner Ohlhausen to see if existing rules accomplish the objectives the FTC seeks:

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<sup>25</sup> Street Bump. Street Bump, *available at* <http://www.cityofboston.gov/DoIT/apps/streetbump.asp>

<sup>26</sup> Comments Of Thomas M. Lenard, Ph.D President And Senior Fellow, Technology Policy Institute, *Effects Of Big Data On Low Income And Underserved Consumers* July 28, 2014 p. 4

<sup>27</sup> *Id.*

<sup>28</sup> FTC Commissioner Maureen K. Ohlhausen Speech Before the Hudson Institute, *The Government's Role in Privacy: Getting it Right*, (October 16, 2012

<sup>29</sup> Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996.

<sup>30</sup> 15 U.S.C. § 1681.

<sup>31</sup> Title VII of the Civil Rights Act of 1964.

“Before seeking new privacy legislation, it is important to identify a gap in statutory authority or to identify a case of substantial consumer harm that we’d like to address, but can’t, with our existing authority, especially given the array of financial, medical, and health and safety harms already reachable under our current FTC authority or other laws. Otherwise, it is difficult to tell whether the additional protections are necessary or will, on balance, make consumers better off because information sharing has benefits for consumers such as reducing online fraud, improving products and services, and increasing competition in the market overall.”<sup>32</sup>

## **Conclusion**

As outlined above, we ask the FTC:

### **Engage in a serious study of actual harms from big data uses.**

The FTC should use consumer complaints, meetings, and surveys to see if harms from big data do indeed exist. These should be actual harms, and not general privacy anxiety.

### **Balance the actual harms versus realized benefits of big data.**

If harms exist, the FTC should balance them against the benefits of big data, some of which are discussed within these comments. The FTC should engage in identifying these benefits and even call out good uses.

### **Review existing laws and identify if gaps exist.**

If the actual harms are not offset by proven benefits, then the FTC should look to see if existing laws could be used to mitigate the harms. At the same time, the FTC should avoid calling for legislation until completion of the process outlined above as calls for legislation should be based on need to protect consumers, not hypothetical harms, and based on research of actual harms not offset by benefits and a need to fill gaps in existing laws.

### **Avoid exaggerating misuses of the term “big data.”**

The FTC and its commissioners enjoy a bully pulpit from which they command the attention of businesses and lawmakers. If FTC Commissioners begin discussing hypothetical problems from big data it could scare away innovation and lead to restrictive legislation.

The FTC has an opportunity to truly shape the future of big data. We only ask that they do so from a place of impartiality and facts. We thank you for your consideration and we ask that you recognize the impact FTC regulation will have on either growing or limiting these wonderful and exciting new innovations.

Sincerely,

**Carl Szabo**

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<sup>32</sup> FTC Commissioner Maureen K. Ohlhausen Speech Before the Hudson Institute, *The Government’s Role in Privacy: Getting it Right*, (October 16, 2012).